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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON
AT SPOKANE

PLUMBERS UNION LOCAL NO. 12
PENSION FUND, Individually and on
Behalf of All Others Similarly Situated,

Plaintiff,

vs.

AMBASSADORS GROUP INC., et al.,

Defendants.

No. CV-09-00214-JLQ

CLASS ACTION

LEAD PLAINTIFF PLUMBERS
UNION LOCAL NO. 12 PENSION
FUND'S OPPOSITION TO
DEFENDANTS AMBASSADORS
GROUP INC., JEFFREY D. THOMAS
AND MARGARET M. THOMAS'
MOTION TO DISMISS FIRST
AMENDED COMPLAINT FOR
VIOLATION OF FEDERAL
SECURITIES LAWS

ORAL ARGUMENT REQUESTED

DATE: May 20, 2010
TIME: 1:30 p.m.
COURTROOM: The Honorable
Justin L. Quackenbush

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1 **I. INTRODUCTION**

2 Ambassadors Group Inc.'s ("Ambassadors" or the "Company") principal
3 business consisted of using direct mail marketing to sell summer travel to middle
4 school and high school students. ¶¶35-37.¹ Ambassador Mem. at 4:2-3.²
5 Commercial name lists provided 90% of the names the Company relied on for its
6 marketing campaigns. ¶37. In 2006, however, Ambassadors suffered a devastating
7 set back. The Company that provided the commercial name lists advised
8 Ambassadors that it would no longer provide middle school student names. ¶¶43-45.

9 The loss of the middle school student names severely damaged Ambassadors'
10 ability to deliver its direct mail marketing campaign. Not only did middle school
11 students (5th, 6th, 7th and 8th grades) represent half of the available student grades,
12 but they had historically enrolled in Ambassadors' programs at a much higher rate
13 than high school students. ¶37. Indeed, close to half of Ambassadors' business
14 depended on acquiring middle school student names. ¶44.

15 The loss of the middle school name lists forced defendants to make critical
16 changes to Ambassadors' direct mail marketing campaign. First and foremost,
17 Ambassadors was no longer able to solicit almost half of its prior customer base.
18 Hoping to forestall catastrophe, defendants altered the mailing campaign by relying on
19 a replacement list and by delivering solicitations to older students with lower income
20

21 ¹ All paragraph references are to the First Amended Complaint for Violations of
22 Federal Securities Laws ("First Amended Complaint"), filed on January 11, 2010.

23 ² "Ambassadors' Mem." refers to Defendants Ambassadors Group Inc., Jeffrey
24 D. Thomas and Margaret M. Thomas' Memorandum in Support of Motion to Dismiss
25 First Amended Complaint for Violation of Federal Securities Laws. Dkt. No. 51.
26

1 levels – households that would not have received solicitations in prior years because
 2 they were unlikely to be able to afford Ambassadors’ programs. ¶¶45, 55.
 3 Defendants also hired an additional marketing executive to work on identifying new
 4 name sources. ¶47.

5 These efforts failed, however, to compensate for the lost middle school student
 6 names. One of plaintiff’s confidential witnesses – CW1 – confirmed that after
 7 Ambassadors started using the replacement names list, the poor performance of the
 8 replacement list in obtaining student responses was discussed in numerous internal
 9 meetings prior to Ambassadors’ July 2007 conference call. ¶53.

10 Despite the devastating loss of the middle school student names, defendants
 11 misled investors by assuring them that Ambassadors’ marketing program was not
 12 materially different from prior years, that increased expenses were due to other causes
 13 and that enrollments would continue to grow. Indeed, on July 24, 2007, defendants
 14 falsely assured investors that Ambassadors’ 2008 marketing campaign was “similar in
 15 timing and delivery as previous years” and that they would be focused on “keeping the
 16 growth going in 2008.” ¶69 at 25:8-9, 28:6-7.

17 Defendants’ assurance that the 2008 marketing campaign was similar to prior
 18 years was materially misleading in light of the truth, *i.e.*, that Ambassadors had lost its
 19 ability to solicit roughly half of its prior customer base, had lowered the minimum
 20 income levels for its solicitations, and was now relying on a replacement list that it
 21 had limited experience using.

22 Ambassadors’ efforts to compensate for the lost middle school names also
 23 resulted in unanticipated expenses due to hiring a new marketing executive, having to
 24 send out a greater number of solicitations and the expense of using the poorly
 25 performing replacement names list. When asked about the additional expenses,
 26

defendants concealed the loss of the middle school student names and attributed the added expenses to other causes. ¶66.

Finally, on October 22, 2007, Ambassadors announced a stunning 30% year-to-year decline in student enrollments for its upcoming program. ¶¶72-73. As a result of that shortfall – the direct result of the lost middle school names – Ambassadors suffered an astounding one-day stock price drop of 44% from which it never recovered, causing hundreds of millions of dollars of lost retirement and investment savings:



II. SUMMARY OF ALLEGATIONS

This matter is brought as a class action on behalf of investors who acquired Ambassadors' common stock between February 8, 2007 and October 23, 2007. ¶1. The Court appointed Plumbers Union Local No. 12 Pension Fund to act as the lead plaintiff. ¶11. In addition to Ambassadors, the named defendants include Jeffrey D. Thomas ("Jeffrey Thomas"), Ambassadors' President and Chief Executive Officer; Chadwick J. Byrd ("Bryd"), Ambassadors' former Chief Financial Officer; and Margaret M. Thomas ("Margaret Thomas"), Ambassadors' Executive Vice President. ¶13.

1 **A. Ambassadors' Business Model**

2 Ambassadors' business principally consists of selling summer abroad trips to
3 middle and high school students. ¶¶35-37; Ambassadors' Mem. at 4. Defendants'
4 own memorandum concedes that Ambassadors' marketing campaign is a two-step
5 process that is wholly dependent on direct mail solicitations:

6 Marketing for the Student Ambassador Program essentially
7 consists of a two-step process. **Ambassadors sends [i.e., delivers]**
8 **direct consumer mailings to invite prospective travelers**, and then
local information meetings are held around the country for interested
students.

9 Ambassadors' Mem. at 5:10-13.

10 Because Ambassadors markets summer travel to middle and high school
11 students, the mailing program occurs on an annual cycle. Ambassadors acquires name
12 lists early in a given calendar year and the executives and marketing personnel then
13 meet in April to analyze the names and organize the mailing effort. ¶¶40, 58. Letters
14 are mailed to students on the name lists in the summer and informational meetings are
15 held in the fall, as the academic year begins, for travel during the following summer.
16 ¶42.

17 Over the years, Ambassadors has developed a large database with detailed
18 information on the solicitations it has mailed, including demographic and income data
19 based on zip codes, and rates at which students respond to letters, attend meetings and
20 ultimately do or do not purchase one of Ambassadors travel programs. ¶52. Based on
21 years of historical data, Ambassadors knew, for example, that if it sent 10,000 letters
22 to middle school students, it would be able to sign up 80 students on average, while if
23 it mailed 10,000 letters to high school students, roughly 27 students would enroll and
24 travel. ¶44.

25 Although approximately a quarter of the letters each year went to middle school
26 students, their better response and enrollment rates meant that middle school students

1 still represented approximately half of the students who became actual customers. *Id.*
 2 Thus, if Ambassadors mailed 40,000 letters, roughly 30,000 of those letters went to
 3 high school students. Those 30,000 letters would result in approximately 81
 4 enrollments (*i.e.*, 27 enrollees for each of the 10,000 letters), while the remaining
 5 10,000 letters to middle school students would result on average in 80 enrollments,
 6 roughly equivalent enrollment for middle and high school students.

7 **B. Ambassadors' Lost Access to Almost Half Its Customer**
 8 **Base**

9 In late 2006, Ambassadors suffered a disastrous setback that fundamentally
 10 altered how it would deliver its marketing program. The source of the middle school
 11 names, American Student List (identified in the First Amended Complaint as List
 12 Company A), advised Ambassadors that it would no longer provide mailing data for
 13 middle school students. ¶¶3, 58. Although the First Amended Complaint refers to
 14 List Company A, lead plaintiff now refers to American Student List by name because
 15 further investigation reveals that the senior executive of People to People International
 16 has publicly identified American Student List as the source of Ambassadors' outside
 17 mailing lists. An investigative report into whether Ambassadors was mailing
 18 misleading solicitation letters to children contains the following information:

19 Eisenhower [People to People International's president] says the names
 of potential student ambassadors are generated from three sources:

- 20 • **A mailing list compiled by the American Student List**
 21 **company;**
- 22 • Nominations from parents and teachers; and
- 23 • Nominations from individuals who've traveled with the
 24 organization.

Grant Decl., Exhibit A.³

Ambassadors' lost access to the middle school names, almost half of its customer base, was a disastrous development and a huge setback for Ambassadors' marketing campaign. Because Ambassadors relied on the purchased mailing lists for approximately 90% of its business, the loss severely restricted Ambassadors' ability to mail solicitations to its most valuable and most responsive customer segment. Ambassadors had lost its ability to solicit almost half of their expected customers (*i.e.*, half of the 90% of the customers that came from the purchased names list). ¶¶37, 40.

In addition to losing access to almost half of their customer base, the loss of the middle school names also forced Ambassadors to:

1. Lower the minimum average income level of the homes that Ambassadors' sent solicitations to (¶55);
2. Hire additional personnel to look for new name sources (¶57);
3. Send a much greater proportion of the solicitations to older, less responsive students; and
4. Lower the initial registration fee from \$400 to \$95 (¶60).

After Ambassadors learned it would not be able to obtain the middle school names for its mailing program, it held its traditional organizational meetings in April 2007 to analyze the names it had obtained – names that no longer included the middle

³ “Grant Decl.” refers to the Declaration of John K. Grant in Support of Lead Plaintiff Plumbers Union Local No. 12 Pension Fund's Opposition to Defendants Ambassadors Group Inc., Jeffrey D. Thomas and Margaret M. Thomas' Motion to Dismiss First Amended Complaint for Violations of Federal Securities Laws, concurrently filed herewith.

1 school students provided by American Student List – and organize the marketing
 2 program. ¶¶50, 58. The individual defendants attended those meetings and by the end
 3 of April 2007, Ambassadors knew how many letters would be sent to the various age
 4 groups, their geographic locations and the income levels for those locations. *Id.*

5 **C. Defendants’ Misleading Statements**

6 By concealing the devastating loss of the middle school names, defendants
 7 assured investors that material difficulties had arisen as compared to prior years. On
 8 July 24, 2007, defendants assured investors that the company was “focus[ed]” on the
 9 2008 marketing campaign. ¶69 at 25:7-8. Concealing the fundamental changes to
 10 Ambassadors’ marketing program both as to age groups and income levels, defendants
 11 misled investors by assuring them that, “[t]he [marketing] campaigns are similar in
 12 timing and delivery as previous years.” *Id.* at 25:8-9. Defendant Jeffrey Thomas
 13 also assured investors that Ambassadors would be “keeping the growth going in
 14 2008.” *Id.* at 28:6-7. Defendants’ statements were misleading because they
 15 concealed the fact that Ambassadors had lost the source for almost 50% of its
 16 customers.

17 On April 23, 2007, Ambassadors told investors that the “first quarter operating
 18 results include increased marketing and development spending as we prepare for and
 19 invest in 2008 programs.” ¶64. During the following day’s conference call, an
 20 analyst asked why expenses were \$2 million higher than had been expected. ¶66 at
 21 22:24-25. Expenses, which had been expected to decrease by \$1.5 million, instead
 22 increased by \$500,000. *Id.* at 22:19-25. Defendant Byrd insisted that “the largest
 23 increase that you see there is primarily for the 2007 [marketing] programs.” *Id.* At no
 24 time, however, did defendants admit or explain that increased expenses were due, in
 25 substantial part, to the loss of and need to replace the middle school names.

Ambassadors' marketing efforts immediately began to falter, demonstrating the critical importance of the lost names. According to CW1, a series of meetings were held prior to the July 24, 2007 conference call to discuss the poor performance of the new list from List Company B in obtaining student responses. ¶53. In fact, CW3 told plaintiffs that when the informational meetings started in the fall of 2007, younger students were not attending the informational meetings. ¶57. He was later told that the reason for the absence was that Ambassadors had been unable to include the younger names in the mail solicitations. *Id.* Employees were asked, moreover, not to exercise their stock options. ¶54.

On October 22, 2007, Ambassadors stunned investors by announcing that its 2008 marketing campaign was suffering a 30% decline in student enrollment. Ambassadors admitted that "as of October 16, 2007, its net enrolled participants for 2008 travel programs were 26,200 compared to 37,300 participants as of the same date last year for its 2007 programs." ¶72. On that announcement, Ambassadors' stock price also collapsed, dropping 44% in a single day, losing \$17.73 per share and closing at only \$21.04.

Ambassadors' admissions during its October 23, 2007 and February 7, 2008 conference calls strongly corroborate plaintiff's allegations. During the October 23, 2007 conference call, Ambassadors said that it was "researching and analyzing the drivers of [the] decline," but that "part of the decline is driven by an unexpected decline in the performance of one of our named databases or sources of names." ¶73.

In the February 7, 2008 conference call, defendants' admissions were more specific:

[W]e had a mailing list issue, which our analysis tells us was a larger issue that the economic environment issues we are facing. . . . [W]e had **one key list perform poorly. . . . [O]ur other lists performed basically at expectations, . . .** the list that underperformed is one of our most important. . . . [T]his list was the most important factor in negative

performance this fall. . . . [T]he issue with the marketing list was much more impactful on our business than the slow-down in the economy. . . . [W]ithout the mailing list we would be seeing application enrollment rates more on a par with what a person might normally expect in this context.

¶75. By defendants' own admission, the bulk of the decline was due to the mailing list problem, with the economy playing a much smaller role, if any.

III. ARGUMENT

U.S. Securities and Exchange Commission ("SEC") Rule 10b-5 makes it unlawful "[t]o make any untrue statement of material fact or to omit to state a material fact necessary in order to make the statements made . . . not misleading." 17 C.F.R. §240.10b-5(b).

In a private action, a plaintiff must prove five elements: (1) a material misrepresentation or omission of fact; (2) scienter; (3) a connection with the purchase or sale of a security; (4) transaction and loss causation; and (5) economic loss. *Zucco Partners, LLC v. Digimarc Corp.*, 552 F.3d 981, 990 (9th Cir. 2009).⁴

Defendants only challenge the first and second elements, arguing that plaintiff has failed to allege any false statements and has failed to allege scienter. On both counts defendants' arguments fail. Although federal securities claims are subject to the Private Securities Litigation Reform Act of 1995 ("PSLRA"), a plaintiff's allegations must still be accepted as true on a motion to dismiss. *Tellabs, Inc. v. Makor Issues & Rights, Ltd.*, 551 U.S. 308 (2007). The First Amended Complaint alleges with sufficient particularity that defendants made misleading statements and that those statements were made with scienter.

⁴ All citations and internal quotations and footnotes are omitted and all emphasis is added unless otherwise noted.

1 The bulk of the misstatements cited in the First Amended Complaint were made
 2 in conference calls as part of joint presentations by the three named defendants.
 3 Under federal law, **each** corporate officer who participates in a conference call or road
 4 show presentation is liable for **all** of the statements made in the presentation, and has a
 5 duty to correct any misrepresentations made during the course of that presentation.
 6 *Barrie v. Intervoice-Brite, Inc.*, 409 F.3d 653, 656 (5th Cir. 2005) (“Where it is pled
 7 that one defendant knowingly uttered a false statement and the other defendant
 8 knowingly failed to correct it, . . . the fraud is sufficiently pleaded as to each
 9 defendant.”); *accord In re SmarTalk Teleservices, Inc. Sec. Litig.*, 124 F. Supp. 2d
 10 527, 543 (S.D. Ohio 2000); *McGuire v. Dendreon Corp. (“McGuire II”)*, No. C07-
 11 800MJP, 2008 U.S. Dist. LEXIS 98773, at *25-*26 (W.D. Wash. Dec. 6, 2008).
 12 Ambassadors itself is liable because the misrepresentations were made by its senior
 13 executive officers.

14 **A. The First Amended Complaint Adequately Alleges that**
 15 **Defendants Made Misleading Statements**

16 Under Ninth Circuit law, a statement is misleading if it creates an “impression
 17 of a state of affairs that differs in a material way from the one that actually exists.”
 18 *Berson v. Applied Signal Tech., Inc.*, 527 F.3d 982, 985 (9th Cir. 2008) (quoting
 19 *Brody v. Transitional Hosps. Corp.*, 280 F.3d 997, 1006 (9th Cir. 2002). SEC Rule
 20 10b-5 prohibits not only statements that are “untrue,” but also makes it illegal to omit
 21 information necessary to prevent other statements from being misleading.

22 “[T]he disclosure required by the securities laws is measured not by literal truth,
 23 but **by the ability of the material to accurately inform rather than mislead**
 24 **prospective buyers.**” *In re Convergent Techs. Sec. Litig.*, 948 F.2d 507, 512 (9th Cir.
 25 1991) (quoting *McMahan & Co. v. Warehouse Entm’t, Inc.*, 900 F.2d 576, 579 (2d
 26 Cir. 1990)). Defendants have a duty to “disclose material facts that are necessary to

1 make disclosed statements, whether mandatory or volunteered, not misleading.”
 2 *Hanon v. Dataproducts Corp.*, 976 F.2d 497, 504 (9th Cir. 1992).

3 A company may refrain from speaking, however, when it does speak it must do
 4 so truthfully, not in half-truths, *Helwig v. Vencor, Inc.*, 251 F.3d 540, 561 (6th Cir.
 5 2001) (en banc) (“[A] company may choose silence or speech . . . but it may not
 6 choose half-truths.”), and a statement that is literally true may be considered a
 7 material misrepresentation if it is misleading in context. *McMahan*, 900 F.2d at 579.

8 Citing *McMahan*, the Ninth Circuit applied precisely the same rule in *Kaplan v.*
 9 *Rose*, 49 F.3d 1363 (9th Cir. 1994). In *Kaplan*, the defendants had represented that
 10 their lithotripsy system “ha[d] been used successfully to treat . . . gallstone patients
 11 since January 1988.” *Id.* at 1372 (see “Statement 2”). The defendants insisted that the
 12 statement was true because it had in fact been used to treat some patients. *Id.*

13 The Ninth Circuit explained:

14 Nevertheless, while it is literally true that some gallstone patients were
 15 treated successfully by the Medstone system, a material issue of fact
 16 remains whether Medstone misleadingly represented that the system was
 being used successfully on a regular basis, especially given the much
 higher success rate of the [competing] German machine.

17 *Id.* Although there may have been some truth to the claim that the system had
 18 successfully helped some patients, a jury could find that the statement would mislead
 19 investors because defendants failed to disclose the fact that Medstone’s 18.5% success
 20 rate was much lower than the 80% success rate of the competing product. *Id.*

21 The misrepresentations alleged in the First Amended Complaint are clearly
 22 actionable under the authorities cited above. After years of significant enrollment
 23 growth, Ambassadors’ marketing campaign for 2008 had suffered a disastrous
 24 setback, including an adverse change in how it could deliver its marketing materials.
 25 It was no longer able to buy name lists for the middle school students who constituted
 26 half of its customers. Since the outside lists represented 90% of its sales,

1 Ambassadors needed to replace 45% of its customer base (*i.e.*, half of 90%) just to
2 maintain the prior year's enrollment level.

3 It is absurd to suggest that Ambassadors' lost access to the middle school
4 student names list would not have a material adverse impact on Ambassadors'
5 marketing campaign **and how that marketing campaign would be delivered**. The
6 middle school students on the outside name lists had historically represented
7 approximately 45% of Ambassadors' customers and defendants were no longer going
8 to be able to rely on those enrollments. These allegations are strongly corroborated by
9 the fact that Ambassadors announced a 30% enrollment shortfall, even after taking
10 steps to compensate for the lost middle school student names.

11 Concealing that setback, and the need to replace the middle school student
12 names, defendants instead assured investors that "[t]he [marketing] campaigns are
13 similar in timing **and delivery** as previous years." ¶69 at 25:8-9. That statement was
14 simply untrue. It was misleading even if it could be considered a "half-truth."

15 It created a false impression because any investor hearing the statement would
16 believe that there was no material difference in how Ambassadors' marketing
17 materials would be delivered. In fact, there was a material difference that was almost
18 certain to damage Ambassadors' marketing campaign. Ambassadors was no longer
19 able to deliver marketing solicitations to the vast majority of the middle school
20 students it had relied on in prior years.⁵

21
22
23 ⁵ Although it would be able to mail solicitations based on its internally developed
24 lists, *i.e.*, referrals from teachers and prior customers, the internal lists only
25 represented 10% of Ambassadors' customers.
26

1 Defendant Jeffrey Thomas further misled investors by assuring them that
 2 Ambassadors would be “focusing more heavily on keeping the growth going in 2008.”
 3 *Id.* at 28:6-7. This forward-looking statement that Ambassadors was focusing and
 4 would increase its focus on continuing to grow was also misleading.

5 Under Ninth Circuit law, a “projection or statement of belief may be actionable
 6 to the extent that one of three implied factual assertions is inaccurate . . . [including]
 7 ‘(3) that the speaker is not aware of any undisclosed facts tending to seriously
 8 undermine the accuracy of the statement.’” *Hanon*, 976 F.2d at 501.

9 Defendants’ “growth” statement falls under this rule. The assurance that
 10 Ambassadors was focused on growth and would increase that focus assured investors
 11 that they could reasonably expect that Ambassadors would continue to grow and that
 12 there was no reason to believe otherwise.

13 Because the loss of the middle school student names was an undisclosed fact
 14 tending to seriously undermine defendants’ assurance that they would “keep[] the
 15 growth going,” a jury could find that it was misleading and created a false impression.

16 Finally, defendants made affirmative statements concerning Ambassadors’
 17 expenses that also concealed the loss of the middle school student names list. Not
 18 surprisingly, Ambassadors incurred substantial expenses in its failed attempt to
 19 compensate for the loss of the middle school student names. Ambassadors hired
 20 additional marketing personnel. Ambassadors also went to a second names list
 21 source, List Company B, to buy additional names to replace the lost middle school
 22 student names. The fact that older names were less productive than the younger
 23 names meant that Ambassadors would need to buy three additional high school names
 24 to replace each lost middle school name.

25 On April 24, 2007, defendants were specifically asked why Ambassadors had
 26 incurred \$2 million more in expenses than had been expected as responded as follows:

LD PLTF PLUMBERS UNION LOCAL NO. 12
 PENSION FUND’S OPPOSITION TO DFTS
 AMBASSADORS GROUP INC., J. D. THOMAS
 AND M. M. THOMAS’ MTN TO DISMISS FIRST
 AMENDED CPLT (CV-09-00214-JLQ)

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1 [Analyst]: Good morning. My first question is, it looks like
 2 selling and marketing expenses have increased roughly \$500,000
 3 sequentially from December to March – whereas, they typically decline
 4 sequentially by \$1.5 million. I was hoping you could explain the change.

5 Chadwick Byrd: Yes, this year we’ve – we’re bringing in some
 6 selling and marketing programs, not only for 2008, but also for 2007. So
 7 the largest increase that you see there is primarily for the 2007 programs.

8 ¶66 at 22:20-25. Defendants also stated that the increased expenses were attributable
 9 to “infrastructure to support the growth in delegates traveling with us, completing
 10 marketing efforts for [the] 2007 program, and initiating marketing efforts for 2008.”
 11 *Id.* at 22:4-7.

12 Defendants concealed the fact, however, that those expenses had increased, in
 13 large part, because of the lost middle school student names and the need to replace
 14 those names by hiring personnel and by buying additional replacement names.

15 **B. Plaintiff has Alleged Why Defendants’ Statements Were**
 16 **Misleading with Adequate Particularity**

17 Contrary to defendants’ assertions, plaintiff alleges why defendants’ statements
 18 were misleading with particularity. Much of defendants’ argument is premised on a
 19 miscomprehension of plaintiff’s allegations. Plaintiff is not arguing that defendants
 20 misrepresented Ambassadors’ actual enrollments or that defendants had a “free-
 21 standing obligation” to update investors on the progress of the enrollments.

22 Plaintiff’s allegation is rather that Ambassadors assured investors that nothing
 23 significant had changed and concealed the fact that it had suffered a devastating
 24 setback to its marketing program that severely impeded its ability to deliver its
 25 marketing materials to middle school students. Its marketing campaigns in previous
 26 years had relied on American Student List to provide mailing information for middle
 school students. Because Ambassadors depended on enrollments from that list for
 approximately 45% of its enrollments, the loss of the list was a severe setback.

1 The First Amended Complaint provides adequate detail to corroborate the
 2 allegations. Based on the information provided by confidential witnesses, plaintiff has
 3 alleged that external list sources had historically provided as much as 90% of
 4 Ambassadors' enrollments and has alleged that internal referral lists generated by
 5 teachers and prior customers provided 10% of the enrollments. Plaintiff has identified
 6 the primary source, American Student List, the company that also provided the middle
 7 school names. Plaintiff similarly has alleged that although the middle school names
 8 represented 25% of the mailings, because of the better response rate (80 enrollments
 9 out of 10,000 mailings to middle school students as opposed to 27 enrollments for
 10 10,000 high school student letters), Ambassadors relied on middle school students for
 11 approximately 50% of its enrollments. Five confidential witnesses independently
 12 confirmed the loss of the middle school names, including a former American Student
 13 List executive. ¶¶43, 45, 55, 57, 58.

14 Plaintiff's allegations are corroborated by outside sources. Not only is the
 15 identity and importance of American Student List confirmed by People to People
 16 International's own executive president, Grant Decl., Ex. A, but defendants' own
 17 admissions corroborate plaintiff's allegations of falsity.

18 On October 23, 2007, defendants themselves conceded that Ambassadors was
 19 experiencing a 30% shortfall in enrollments. ¶73. Four months later, after analyzing
 20 the shortfall, defendant Jeffrey Thomas stated that the shortfall was isolated to a single
 21 list that they had only tested in the last two years and that "our other lists performed
 22 basically at expectations, no matter the offer, the source or any other demographic
 23 factor," excluding the possibility that a weak economy was an important factor in the
 24 decline. ¶75. In defendants' own words, "the issue with the marketing list was much
 25 more impactful on our business than the slow-down in the economy." *Id.*

1 A critical question, however, is why did Ambassadors need to rely on a
 2 replacement list source (the new list had been “tested” in 2005 and 2006) for over
 3 30% of its enrollments in the first place? The only possible explanation is that
 4 Ambassadors must have lost an equivalent number of names that it was trying to
 5 compensate for. Ambassadors was trying to compensate for the loss of the middle
 6 school student names.

7 The authorities that defendants cite do not require a different result. In *Brody*
 8 and *Osher v. JNI Corp.*, 308 F. Supp. 2d 1168 (S.D. Cal. 2004), *aff’d in part and*
 9 *vacated in part*, 183 Fed. Appx. 604 (9th Cir. 2006), the courts held that the alleged
 10 omissions were not misleading because the alleged omissions did nothing to render
 11 the defendants’ affirmative statements misleading.

12 In *Brody*, defendants issued a press release concerning the progress of an
 13 ongoing stock repurchase program and a second release announcing the defendants’
 14 receipt of “expressions of interest” from parties interested in acquiring the company.
 15 *Brody*, 280 F.3d at 999. Plaintiffs argued that the press releases were misleading
 16 because they failed to provide information concerning the acquisition offers.

17 The Ninth Circuit held that neither press release was misleading. The first press
 18 release was not misleading because nothing in that press release “stated **nor implied**
 19 anything regarding a merger.” *Id.* at 1006. Discussing one subject does not create an
 20 obligation to discuss an unrelated topic. The second press release, that did address the
 21 proposed acquisition, was not misleading either because the press release and the
 22 omitted information were consistent and merely differed in the level of detail. *Id.* at
 23 1006-07.

24 Similarly in *Osher*, a district court held that a press release concerning a
 25 corporation’s announcement of a certification agreement with another company was
 26 not misleading because it failed to discuss problems the first company was

1 experiencing with a product not mentioned in the press release. *Osher*, 308 F. Supp.
 2 2d at 1179-80. As in *Brody*, there was no relationship between the press release and
 3 the omitted information.

4 In sharp contrast to *Brody* and *Osher*, the misrepresentations in this case are
 5 directly related to the alleged omissions. The alleged misstatements addressed the
 6 same subjects as the omissions. Defendants assured investors that the **delivery** of the
 7 2008 marketing campaign would be similar to prior years, that nothing important had
 8 changed. The alleged omission – the lost ability to **deliver** solicitations to middle
 9 school students – is directly related to and contradicts defendants’ assurance that the
 10 marketing campaign was similar to prior years. By defendants’ own admission to the
 11 Court, the **delivery** of the marketing campaign consisted of mailing solicitations to
 12 middle school and high school students followed by informational meetings.
 13 Although it may have been similar in some aspects, it was materially and adversely
 14 different in very important aspects. In similar fashion, defendants’ representations
 15 concerning expenses also directly addressed the same matter that was misleadingly
 16 omitted, that the unexpected \$2 million increase in expenses was due in large part to
 17 the loss of the middle school student names.⁶

18
 19 ⁶ *In re Loudeye Corp. Sec. Litig.*, No. C06-1442MJP, 2007 U.S. Dist. LEXIS
 20 60624 (W.D. Wash. Aug. 17, 2007), and *McGuire v. Dendreon Corp.* (“*McGuire I*”),
 21 No. C07-800MJP, 2008 U.S. Dist. LEXIS 65436 (W.D. Wash. Apr. 18, 2008), are
 22 similarly distinguishable. In *McGuire I*, the court held that an announcement that the
 23 Food and Drug Administration (“FDA”) “action,” *i.e.*, a decision, was expected, did
 24 not imply that FDA approval was predicted. In *Loudeye*, the court similarly held that
 25 the plaintiffs had failed to identify any statements that were inconsistent with the
 26

C. The First Amended Complaint Alleges a Strong Inference of Scienter that Is as Compelling as Any Competing Inference Particularly When the Allegations Are Properly Considered as a Whole

The First Amended Complaint also alleges facts that support a strong inference that each of the defendants acted with actual knowledge and with deliberate recklessness. Discussing scienter in *Tellabs*, the Supreme Court set out four guidelines. First, courts must “accept all factual allegations in the complaint as true.” *Tellabs*, 551 U.S. at 322. Second, “courts must consider the complaint in its entirety,” *i.e.*, “[t]he inquiry . . . is whether all of the facts alleged, **taken collectively**, give rise to a strong inference of scienter, not whether any individual allegation, scrutinized in isolation, meets that standard.” *Id.* at 322-23. Third, “the court must take into account plausible opposing inferences.” *Id.* at 323. Finally, expressly rejecting the requirement that the inference of scienter requires a “smoking-gun,” the Supreme Court held that scienter is adequately alleged if, “a reasonable person would deem the inference of scienter cogent and at least as compelling as any opposing inference one could draw from the facts alleged.” *Id.* at 324.

The Ninth Circuit has similarly held that plaintiff’s allegations should be analyzed collectively to determine scienter has been adequately alleged (*Zucco*, 552 F.3d at 992; *Siracusano v. Matrixx Initiatives, Inc.*, 585 F.3d 1167, 1180 (9th Cir. 2009)), and has conceded that Ninth Circuit scienter decisions that preceded *Tellabs*, such as *In re Silicon Graphics Sec. Litig.*, 183 F.3d 970 (9th Cir. 1999), may have applied a scienter standard that was too demanding:

allegedly concealed information. Here in contrast, plaintiff has alleged concealed information that is directly inconsistent with defendants’ representations .

[T]he Supreme Court's recent *Tellabs* decision also discusses the level of detail required under the PSLRA, and with its controlling and persuasive weight, it suggests that perhaps *Silicon Graphics*, *Vantive*, and *Read-Rite* are too demanding and focused too narrowly in dismissing vague, ambiguous, or general allegations outright.

South Ferry LP v. Killinger, 542 F.3d 776, 784 (9th Cir. 2008).

Ninth Circuit law requires a plaintiff to allege that misleading statements of existing fact were made either with actual knowledge with "deliberate recklessness," while misleading projections must be made with actual knowledge of facts undermining the projection. *No. 84 Employer-Teamster Joint Council Pension Trust Fund v. America West Holding Corp.*, 320 F.3d 920, 931 (9th Cir. 2003). Recklessness must be shown by highly unreasonable omissions or misrepresentations that involve "not merely simple, or even inexcusable negligence, but an extreme departure from the standards of ordinary care, and which presents a danger of misleading buyers or sellers that is either known to the defendant or is so obvious that the [defendant] must have been aware of it." *Howard v. Everex Sys.*, 228 F.3d 1057, 1063 (9th Cir. 2000); *Institutional Investors Group v. Avaya, Inc.*, 564 F.3d 242, 267 n.42 (3d Cir. 2009).

Here, the First Amended Complaint establishes a strong inference of scienter by alleging specific facts from confidential witnesses with knowledge of and exposure to the facts such that their statements may be relied upon – each was a senior marketing employee with management level responsibilities for precisely the issues alleged in the First Amended Complaint. ¶¶27-34; *Zucco Partners*, 552 F.3d at 990. The First Amended Complaint describes the confidential witnesses' job titles and responsibilities, and offers "enough particularized detail to support a reasonable conviction in the [confidential witnesses'] basis of knowledge," and the "coherence and plausibility of the allegations." *In re Metawave Commc'ns Corp. Sec. Litig.*, 298 F. Supp. 2d 1056, 1068 (W.D. Wash. 2003).

1 **1. The Individual Defendants Attended the April 2007**
2 **Organizational Meeting and Weekly Executive**
3 **Meetings Where the Loss of the Names List Was**
4 **Necessarily Discussed**

5 Every April, Ambassadors held meetings to analyze the student names the
6 Company had collected and to organize the mailing program for the upcoming year.
7 ¶¶40, 50, 58. CW5, a senior program director who attended the meetings, confirmed
8 that Jeffrey Thomas and Margaret Thomas also attended the April 2007 meetings.
9 ¶58. In addition to the April meetings, a confidential witness also stated that
10 Ambassadors' executives held weekly meetings to review the past weeks' mailings.
11 ¶61. Because the mailings began in June (¶¶51, 61), Ambassadors' executives would
12 have met four to six times to review Ambassadors' mailings and student responses by
13 the July 24, 2007 conference call.

14 Given the fact that middle school students represented almost half of
15 Ambassadors' customer base, it is "absurd" to suggest, just as in *America West*, that
16 the loss of the middle school student would not have been discussed in the April 2007
17 meetings to review the names and organize the mailing campaign and/or in the
18 subsequent weekly review meetings. Ambassadors' senior executives certainly would
19 have been informed of the devastating loss of the middle school student name lists.
20 CW5 also stated that defendant Jeffrey Thomas was familiar with the Company's
21 statistics and knew which names performed better than others, which is consistent
22 with the subject and purpose of the meetings. *Id.*

23 Thus, the First Amended Complaint alleges a strong inference that each
24 individual defendant had knowledge at least by April 2007 of the loss of names of
25 middle school students, and would have known the implications of that decision on
26 the marketing program for the Company.

1 **2. As Senior Executives, Defendants Necessarily Knew**
2 **About the Loss of the Middle School Student Names**
3 **Given Crucial Importance of Those Names to**
4 **Ambassador's Core Operations**

5 A strong inference of defendants' scienter is also supported by the critical
6 importance of the middle school student names to Ambassadors' core business
7 operations and the individual defendants' roles as senior executives. Courts have
8 repeatedly recognized that some facts or events are so important to a corporation's
9 business that it is extremely unlikely that they would not have come to the attention of
10 the senior executives. *Berson*, 527 F.3d at 987 ("[H]igh-level managers must have
11 known about the orders because of their devastating effect on the corporation's
12 revenue."); *America West*, 320 F.3d at 943 n.21 (issues alleged by plaintiffs were so
13 important to the company that it was "absurd to suggest that the Board of Directors
14 would not discuss" them); see *South Ferry*, 542 F.3d 776.

15 The First Amended Complaint alleges facts that directly parallel the allegations
16 that the Ninth Circuit found sufficient to establish a strong inference of scienter in
17 *Berson* and *America West*. In *Berson*, stop-orders had been placed on two contracts
18 totaling \$18 to \$23 million of work. *Berson*, 527 F.3d at 988. The individual
19 defendants were responsible for the corporate defendant's day-to-day operations. *Id.*
20 Although the complaint "allege[d] no particular facts indicating that [the individual
21 defendants] actually knew about the stop-work orders," the Ninth Circuit found that it
22 was "hard to believe that they would not have known about stop-work orders that
23 allegedly halted tens of millions of dollars of the company's work." *Id.* at 987-88.

24 Similarly in *America West*, the complaint alleged that the Federal Aviation
25 Administration ("FAA") had contacted the defendant concerning maintenance
26 problems and that the corporation had authorized millions of dollars of stock
27 repurchases. *America West*, 320 F.3d at 943. The Ninth Circuit stated that any

1 assertion that the individual defendants were aware of these issues was “patently
2 incredible.” *Id.* at 943 n.21. “It is absurd to suggest that the Board of Directors would
3 not discuss” the stock repurchases or FAA investigations. *Id.*

4 Finally, in *South Ferry*, the Ninth Circuit explained that the “core-operations
5 inference,” standing alone, can adequately support a strong inference of scienter
6 “where the nature of the relevant fact is of such prominence that it would be ‘absurd’
7 to suggest that management was without knowledge of the matter.” *South Ferry*, 542
8 F.3d at 784, 786.

9 The allegations in the First Amended Complaint present precisely such a case.
10 Ambassadors depended on the outside middle school student name lists for roughly
11 45% of its customer base. This allegation is confirmed by defendants’ own October
12 23, 2007 admission that they had experienced a 30% shortfall in enrollments as
13 compared to the prior year (notwithstanding efforts to compensate for the loss). Just
14 as the Ninth Circuit suggested in *Berson*, *America West* and *South Ferry*, it is absurd
15 to suggest that Ambassadors’ senior executives were unaware of a problem of this
16 magnitude.

17 As Ambassadors’ senior executives, the individual defendants would
18 necessarily have been aware of and participated in numerous decisions Ambassadors
19 made due to the loss of the middle school student names. Once Ambassadors learned
20 that it would no longer be able to obtain commercial name lists for the middle school
21 students, Ambassadors and the individual defendants would necessarily have had to:

22 1. Approve the acquisition of the American Student List name lists without
23 the middle school student names;

24 2. Identify and approve the alternative replacement name source to
25 compensate for the lost middle school names;

1 3. Make the decision to lower the minimum household income levels that
2 Ambassadors would send solicitations to;

3 4. Approve the hiring of a new marketing executive to identify additional
4 name sources;

5 5. Approve the decision to lower the registration fee from \$400 to \$95; and

6 6. Approve the marketing campaign for 2008, without the middle school
7 student names it had previously relied on.

8 Because it is incomprehensible that these issues could have been addressed and
9 resolved in a relatively small corporation without the knowledge of the three senior
10 executives, the First Amended Complaint adequately alleges scienter.

11 **3. Defendants' Access to the Student Program Database** 12 **Supports Scienter**

13 Numerous decisions also hold that plaintiffs can establish scienter by alleging
14 that defendants had access to information that contradicted their public statements. In
15 *South Ferry*, the Ninth Circuit recognized that scienter could be demonstrated by
16 allegations that the “defendants had actual access to the disputed information.” *South*
17 *Ferry*, 542 F.3d at 786. In *In re Countrywide Fin. Corp. Sec. Litig.*, 588 F. Supp. 2d
18 1132 (C.D. Cal. 2008), the court similarly held that: “[T]aken together, Sambol’s job
19 positions, duties, **and access to corporate reports and information systems** give
20 rise to a strong inference of scienter.” *Id.* at 1194. More recently, in *In re Washington*
21 *Mut., Inc. Sec., Derivative & ERISA Litig.*, No. 2:08-md-1919 MJP, 2009 WL
22 3517630 (W.D. Wash. Oct. 27, 2009), the plaintiffs raised a strong inference of
23 scienter by alleging, among other things, that the defendant had “access to information
24 contradicting his statements.” *Id.* at *9.

25 Here, the individual defendants similarly had access to information rendering
26 their statements misleading. In addition to information provided at the April 2007 and

subsequent meetings, the defendants had access to the Student Program database used to analyze Ambassadors' direct mail marketing campaigns. With the Student Program database, the individual defendants were able to generate reports on an ongoing basis, to track and analyze the Company's marketing efforts. ¶52. The Student Program database provided student names, ages, and response or enrollment data. *Id.* Defendants' access to this information further supports scienter.

4. Defendants' Stock Sales Provide Additional Evidence of Scienter

The timing of defendants' stock sales provides further support for an inference of scienter. Although allegations of insider trading are not necessary to establish scienter, they may contribute to an evaluation of whether a strong inference of scienter is supported by the entirety of the complaint. *Tellabs*, 551 U.S. at 325. They can provide circumstantial evidence of conscious or deliberately reckless conduct. *Silicon Graphics*, 183 F.3d at 986.⁷

Here, defendants Margaret and Jeffrey Thomas unloaded over \$4 million of Ambassadors' common stock in the six months preceding the admission in the

⁷ Plaintiff also notes that the SEC also appears to have concluded that transactions in Ambassadors' securities merits investigation. In a recent filing with the SEC, Ambassadors revealed that "On October 27, 2009, the Company was informed by the SEC that it had issued a formal order of investigation with respect to trading in the Company's securities. The Company believes that the investigation is for the period August through December, 2007. In connection with the investigation, the Company, certain of its officers, directors and employees, as well as other persons, have received subpoenas from the SEC requesting information." Grant Decl., Ex. C at 28.

1 October 2007 conference call that the names source had underperformed. Indeed, as
 2 defendants point out, over 70% of the Thomas' sales were made no later than June 4,
 3 2007. Ambassadors' Mem. at 32. The timing is significant. By April 2007 the
 4 individual defendants were well aware of the loss of the names source and could
 5 anticipate the consequences on enrollment and the Company's performance.

6 On one day alone, June 4, 2007, Jeffrey Thomas sold 51,000 shares for
 7 proceeds of over \$1.7 million. ¶80. Between June and August, he sold over \$3
 8 million worth of Ambassadors shares, or approximately \$1 million more than he had
 9 sold in a comparable period in 2006. *Id.*; Greene Decl.,⁸ Ex. K at 118-119. Similarly,
 10 in a brief two week period in May 2007, defendant Margaret Thomas sold over 34,100
 11 shares realizing proceeds of over \$1.1 million. ¶80. As defendants point out, her May
 12 2007 sell-off represented twice the number of shares as her sell-off three years earlier
 13 in March 2004, netting her approximately \$418,000, and over four times the number
 14 of shares she had sold in 2005, which earned her approximately \$360,000.
 15 Ambassadors' Mem. at 34; Greene Decl., Ex. L at 121-122. As corroborated by
 16 multiple confidential witnesses, moreover, the defendant executives realized these
 17 profits at the very same time executives at the Company were instructing the
 18 employees not to exercise their own stock options. ¶¶54, 56.

19 The rational inference from defendants' concealment of the impaired marketing
 20 program is that they sought to prop up the value of their stock in order to divest
 21

22 ⁸ "Greene Decl." refers to the Declaration of Douglas W. Greene in Support of
 23 Defendants Ambassadors Group Inc., Jeffrey D. Thomas and Margaret M. Thomas'
 24 Motion to Dismiss First Amended Complaint for Violations of Federal Securities
 25 Laws. Dkt. No. 53.
 26

1 themselves of as much of their holdings as possible in advance of the bad news that
 2 would inevitably arrive. Plaintiffs are entitled to the benefit of this reasonable
 3 inference on a motion to dismiss. *In re Gilead Scis. Sec. Litig.*, 536 F.3d 1049, 1055
 4 (9th Cir. 2008) ([T]he court must ““accept the plaintiffs’ allegations as true and
 5 construe them in the light most favorable to the plaintiffs.””), *cert denied*, *Gilead Scis.,*
 6 *Inc. v. St. Clare*, __ U.S. __, 129 S. Ct. 1993 (2009).

7 **5. Plaintiff’s Allegations, Considered Collectively, Easily** 8 **Support a Strong Inference of Scierter**

9 Plaintiff respectfully submits that the inference arising from the allegations of
 10 the individual defendants’ participation in the April 2007 meetings (to analyze the
 11 name lists and organize the mailing campaign) and the inference arising from the
 12 overwhelming importance of the middle school student name lists are each adequate
 13 to support a strong inference of scierter. The inference arising from **all of the**
 14 **allegations considered as a whole** overwhelmingly supports a strong inference of
 15 scierter. In fact, plaintiff is only required to allege that a cogent inference of scierter
 16 is at least as compelling as the alternative inference. *Tellabs*, 551 U.S. at 324.

17 Considered in their entirety as *Tellabs* requires, the allegations of the individual
 18 defendants’ participation in the April 2007 meetings to organize the 2008 marketing
 19 campaign, their attendance in weekly Monday meetings once the mailings began, the
 20 importance of the middle school student names to Ambassadors’ business, the
 21 individual defendants’ roles as Ambassadors’ senior executives, the necessary
 22 participation of the individual defendants in important decisions to adjust for the loss
 23 of the middle school student names, and their access to the Student Program database,
 24 demonstrate that it would be absurd to suggest that Ambassadors’ senior executives
 25 were unaware that the Company had lost its access to middle school names which had
 26 previously accounted for 45% of its business.

1 Here, the inference of scienter not only is cogent, but is far more likely and
 2 excludes the possibility that they were unaware of the lost access to the commercial
 3 middle school name lists provided by American Student List, a critical set-back to
 4 Ambassadors' 2008 marketing campaign.

5 **D. The First Amended Complaint Sufficiently Pleads Control**
 6 **Person Liability**

7 To plead control person liability, plaintiff must show a primary violation of the
 8 federal securities laws and that each defendant controlled the violator. *Howard*, 228
 9 F.3d at 1065. "[I]t is not necessary to show actual participation or the exercise of
 10 actual power" to make out a *prima facie* case. *Id.* Defendants do not dispute
 11 Ambassadors' control over the individual defendants as corporate officers, nor that
 12 each of the individual defendants, as a senior executive officer of the Company,
 13 establishes that they were "control persons" under §20(a) of the Securities Exchange
 14 Act of 1934.

15 **E. Dismissal with Prejudice Is Not Warranted**

16 Defendants argue that the First Amended Complaint should be dismissed with
 17 prejudice on the grounds that amendment would be futile. *Eminence Capital, L.L.C.*
 18 *v. Aspeon, Inc.*, 316 F.3d 1048 (9th Cir. 2003). As set forth above, plaintiff has
 19 properly alleged causes of action against the defendants for violation of the antifraud
 20 provisions of the federal securities laws. The present motions are defendants' first
 21 motions to dismiss this matter and the Court's first consideration of these issues.
 22 Plaintiff has and is continuing its investigation into the alleged matters and
 23
 24
 25
 26

respectfully requests leave to amend if the Court finds any portion of plaintiff's allegations inadequate.

DATED: March 11, 2010

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I hereby certify that on March 11, 2010, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system which will send notification of such filing to the following:

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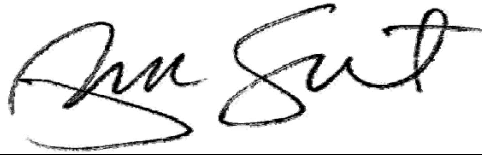
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1 I certify under penalty of perjury under the laws of the United States of America
2 that the foregoing is true and correct. Executed on March 11, 2010.

3
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LD PLTF PLUMBERS UNION LOCAL NO. 12
PENSION FUND'S OPPOSITION TO DFTS
AMBASSADORS GROUP INC., J. D. THOMAS
AND M. M. THOMAS' MTN TO DISMISS FIRST
AMENDED CPLT (CV-09-00214-JLQ)

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